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No. 06-457

Supreme Court, U.S.
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# In The
# Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,

*Petitioner,*

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, MASSACHUSETTS MOTOR TRANSPORTATION ASSOCIATION, INC., and VERMONT TRUCK & BUS ASSOCIATION, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## REPLY IN SUPPORT OF PETITION

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## REPLY IN SUPPORT OF PETITION

A. Respondents, like the First Circuit, read the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A), in a manner that has astoundingly broad consequences. Respondents do not deny that under their reading of the statute a state cannot utilize the most obvious and effective means of effectuating a prohibition against knowing delivery of tobacco and other problematic substances to minors. Even the First Circuit understood the obvious tension, impracticality and difficulty of its decision. (Pet. App. 28-29). The lower court's holding, if followed to its logical conclusion, would undermine the full panoply of non-economic state public health delivery laws (Pet. App. 18), a conclusion fully reflected in respondents' arguments. *See* Br. in Opp. 22-24.

That position cannot be right. Congress has left to, and specifically conditioned certain federal funding on, the states' control over the sale and distribution of tobacco to children. Synar Amendment, P.L. 102-321, Title II, § 202, 106 Stat. 394, *codified at* 42 U.S.C. § 300x-26(a)(1) & (b)(1); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 552 (2001) (citing Synar Amendment as establishing "congressional policy that supports" "state laws prohibiting cigarette sales to minors"). It is simply inconceivable that just two years after it enacted the Synar Amendment Congress *sub silentio* dramatically limited that law by preempting the states from controlling delivery sales of tobacco to children. Nor can there be any serious doubt that state laws regulating carriers were intended to be one of the principal means of reducing the sale of tobacco to minors. Indeed, both this Court and the federal government have expressly confirmed that obvious proposition. In *Granholm*

*v. Heald*, 544 U.S. 460, 490-91 (2005), this Court assumed that states retain the power to do precisely what the First Circuit held was preempted – require age verification for delivery sales. And the federal report relied upon by the Court in *Granholm* explained that states could impose requirements on delivery personnel "to verify a customer's age, such as examining a picture identification," and noted in particular UPS's procedures for adult signature and identification and for notifying shippers of unlabelled wine. *FTC, Possible Anticompetitive Barriers to E-Commerce: Wine* 29, 37 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (last visited December 8, 2006).

No credible reading of the history of the FAAAA – which was part of an effort to free carriers of state rate and tariff regulation – supports the appeals court's holding or respondents' arguments. The Administration, the American Trucking Association, and UPS asked Congress *only* for preemption of state economic regulation.[1] No one sought or mentioned preemption of public health laws because, had the carriers or the conferees even hinted

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[1] *United States House of Representatives Subcommittee on Surface Transportation, Testimony of Frank E. Kruesi, Assistant Secretary for U.S. Department of Transportation*, July 20, 1994 (economic regulation to be preempted dealt with such matters as entry controls, tariffs and rates); *Id., Testimony of James A. Rogers, Vice President, Governmental Affairs, United Parcel Service*, July 20, 1994 (UPS testified in favor of preemption of state "economic regulation," such as rates and entry restrictions); *United States Senate Subcommittee on Surface Transportation, Testimony of Thomas V. Donahue, President and Chief Executive Officer, American Trucking Association*, July 12, 1994 (testified in favor of the preemption of "state economic regulation," advocating that it would allow "states to continue to regulate non-rate or economic entry factors" and "non-economic aspects of state regulation").

at such a result, it would have prompted fierce opposition from public health and anti-smoking advocates.

Respondents continue to argue that the areas excepted from FAAAA preemption are limited to those listed in the statute. Br. in Opp. 21-22. But the language of the statute does not require that result and the conferees could not have been more clear that the list of non-economic exceptions from FAAAA preemption was "not intended to be all inclusive, but merely to specify some of the matters which are not 'prices, rates or services' and which are therefore not preempted." H.R. Conf. Rep. No. 103-677, at 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756, 1758-60.

B. The sweeping breadth of the First Circuit's and respondents' reading of the FAAAA is revealed by looking at the Maine statutes struck down in this case. The lower court found preempted a provision that does not apply to carriers at all. Respondents assert that 22 Me. Rev. Stat. Ann. § 1555-C(3)(C) requires carriers to identify the contents of each package, have the addressee sign for the package, and check the age of the recipient. Br. in Opp. 3, 20. The provision requires no such thing. Section 1555-C(3)(C) mandates only that a tobacco *retailer* utilize a carrier that provides age verification and signature options. *It places absolutely no requirements on a carrier.* If a retailer uses a carrier that does not provide such options, it is the retailer and *not* the carrier that violates that provision. Under the First Circuit's broad interpretation, the FAAAA preempts that provision even though it does not implicate carriers. Moreover, respondents do not dispute that UPS both before the enactment of the Maine law and today provides reasonably priced age verification and signature options,

nor do respondents dispute that these options do not adversely affect UPS's operations.

Respondents go on to assert that section 22 Me. Rev. Stat. Ann. § 1555-D required UPS to alter its operation by looking for tobacco markings and researching whether the addressee is a licensee. Br. in Opp. 4. Of course, imputing knowledge to the carrier that a package contains tobacco is the only plausible way of preventing carriers from delivering tobacco to children or from unlicensed retailers, and even the appeals court recognized the impracticality resulting from its striking down the provision. (App. 29). Respondents do not seriously dispute that proposition.[2] Nor do they dispute that ordinarily and prior to the enactment of this law UPS visually scanned at many stages of its operations all sides of the exterior packages for various markings, nor that the additional cost of looking for tobacco markings and labels was less than a penny a package.[3] Thus, to the extent

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[2] Respondents suggest that the decision in *Robertson v. State of Washington Liquor Control Board*, 10 P.3d 1079 (Wash. App. Ct. 2000), shows that a case can be made against a trucker, without relying on imputed knowledge. Br. in Opp. 17. There, the trucker lost his vehicle to forfeiture because he failed to prove that he did not know he was hauling cigarettes. From the decision, we do not know what evidence was presented. In any event, pursuant to respondents' view of the FAAAA, the state could not use cigarette markings on packages to rebut a trucker's assertion that that he did know he was transporting cigarettes.

[3] Respondents claim that the costs to UPS are more than the petition relates. Br. in Opp. 4 n.3, 20 n.12. Respondents, however, do not dispute that the cost of visually scanning (*i.e.*, looking at) packages for tobacco markings and labels is less than one cent per package, and that the only number in the record for packages researched resulting from such scannings is a total of 33.

that Maine's law alters UPS's operations, the effect certainly is not significant.[4]

Respondents' claim that Maine is "conscript[ing] carriers to be the enforcement mechanism . . . , rather than conduct[ing] its own enforcement efforts" (Br. in Opp. 18), ignores the facts and the law. First, according to the American Lung Association, Maine leads the nation in tobacco control, receiving perfect grades for, *inter alia*, restriction of youth access. *American Lung Association – State of Tobacco Control: 2005*, at 96-97.[5] Second, and most importantly, it is illegal for any person to "sell, furnish, give away or offer to sell, furnish or give away a tobacco product to any person under 18 years of age." 22 Me. Rev. Stat. Ann. § 1555-B(1) & (2). Generally, anyone who delivers a package with tobacco markings or labels on it would be presumed to know it contains tobacco, which is the only reasonable means to enforce this law. The First Circuit's decision means that anyone who hands a package with tobacco markings to a child violates Maine law, *other than a carrier*. The appeals court thus created immunity

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[4] Regarding UPS's "nationwide policy of prohibiting shipments of cigarettes for delivery to consumers" (Br. in Opp. 4), that policy is pursuant to an agreement with New York, reached after several courts rejected commerce clause and FAAAA challenges to New York's tobacco delivery laws. Under this agreement UPS performs many of the functions contemplated by Maine law, and apparently does so without dramatically affecting UPS's operations. However, Maine cannot enforce that agreement and policy, that agreement and policy only applies to cigarettes (and not to other tobacco products covered by Maine law), UPS can terminate the agreement if New York's laws are unenforceable, *e.g.*, are preempted by the FAAAA, and the carriers remain immune from Maine penalties under the appeals court decision.

[5] This report is available at: http://www.mainelung.org/z_homepage features/Images/sotc_2005final.pdf (last visited December 8, 2006).

for carriers because they hand over the tobacco at the front door of someone's home rather than at a store counter. Congress could not possibly have intended such an absurd result. As noted, the Synar Amendment makes clear that Congress left to the states how to control youth access to tobacco. Requiring retailers and carriers to utilize at the point of delivery similar safeguards to over-the-counter sales is the obvious and most effective means to deal with the problem of delivery sales.

Respondents are therefore far afield when they contend that Maine should be faulted for not making a record below that other existing or hypothetical regulations fail to effectively protect children from tobacco deliveries. Br. in Opp. 5, 20. Respondents' preferred approach to the problem of teen smoking – imposing licensing and reporting requirements on Internet and telephone *retailers* – are of little value if the carrier who physically delivers the package with tobacco markings need not verify the age of the recipient. Even with the enforcement of the non-preempted provisions, the carrier is an open conduit for deliveries of tobacco to children. Moreover, section 1555-C(3)(C) *is* a regulation of retailers, ensuring they do what is necessary to prevent delivery of tobacco to children. Yet respondents successfully had the lower court strike it down. Maine can now effectively control neither the retailer nor the carrier at the point of delivery.[6]

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[6] Respondents erroneously assert the record is incomplete because petitioner objected to depositions of the Attorney General and other state officials regarding enforcement activities. Respondents explained to the Magistrate that the reason for this discovery was to deal with standing and ripeness issues and impact on carriers. The matter was

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C. Petitioner does not disagree with respondents that the Ninth and Second Circuit decisions do not deal with transportation of goods. Those decisions, as well as those of the lower courts, however, present a radically different approach towards the FAAAA than that of the First Circuit, which if applied to the Maine statute would mandate a different result. The First Circuit entirely discounted the nature and public health import of the state law, instead finding that so long as it affected UPS's operations, it was preempted. No other case in the land has interpreted the FAAAA so broadly, and respondents do not suggest otherwise.

While there is no dispute regarding the body of legislative history, the First Circuit reads that history much differently than the other cases. For example, the Ninth Circuit looked to legislative history which identified a few states, including Maine and California, as having no laws that were intended to be preempted. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1087 (9th Cir. 1998), *cert. denied,* 526 U.S. 1060 (1999). Because a prevailing wage law was on the books in California at the time of the FAAAA's enactment, the Ninth Circuit found there was no preemption of such laws. Under the Ninth Circuit's reasoning in *Mendonca*, tobacco delivery laws would be upheld because, *inter alia,* delivery laws were on the books in Maine at the time of enactment of the FAAAA.

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resolved by the parties stipulating that "there is an immediate threat of enforcement" of the challenged provisions against "any carrier coming into the State of Maine." *Report of Telephone Conference and Order* (July 15, 2004). At no time did respondents assert that they sought discovery regarding the efficacy of the challenged provisions or any other Maine tobacco laws.

D. Respondents attempt to delicately parse out this Court's ERISA decisions to show that application of their reasoning would reach the same result as the First Circuit. Br. in Opp. 9-12. But the significance of the ERISA cases is not the specific guides devised there to address ERISA's particular preemption provision, but rather that the courts look behind the broad "related to" language to the actual legislative intent in order to determine if Congress intended to preempt areas of traditional state regulation. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). There is no doubt that Congress intended that public health laws were not to be preempted by the FAAAA because "[t]he problem to which the congressional conferees attended was 'state *economic* regulation'." *City of Columbus v. Ours Garage and Wrecking Service, Inc.*, 536 U.S. 424, 440 (2002) (emphasis in original). Under the ERISA cases, moreover, the lack of any positive indication of an intent to preempt an area of state regulation (which is the case here regarding tobacco delivery laws), and the enactment by Congress of a law that reinforces the state law (here, the Synar Amendment), strongly argues against preemption. *See California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 332 n.7 (1997).

The legislative history of the FAAAA makes clear that when the conferees referred to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), as setting forth the level of preemption, they intended to apply that preemption only to "economic" regulations, H.R. Conf. Rep. No. 103-677, at 83, 84, 86-88 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1755, 1756, 1258-60, which is all that UPS and the trucking industry sought. As Congress never intended to preempt tobacco delivery laws and Maine's

laws are not "economic regulations," Respondents' crabbed application of the ERISA decisions does not apply at all.[7]

## CONCLUSION

In the end, it is critically important for Maine and other states to know whether the broad, boundless import of the First Circuit decision, which wholly discounts the states' public health police powers, is the law of the land, or a more refined version of preemption is applicable which might allow some effective regulation of retailers and carriers. Even respondents do not dispute that tobacco delivery sales to children are a significant national public health problem. The states need to know whether statutes such as Maine's are permissible means of addressing that problem.

Respectfully submitted,

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[7] Respondents also suggest that these provisions are economic because they deal with tax collection. As the district court held below, however, the challenged provisions had nothing to do with tax collection. Petitioner's Appendix, 59 n.76.